

N.D.A.G. Letter to Meyer (Feb. 17, 1987)

February 17, 1987

Senator Dean Meyer
District 36
State Senate
State Capitol
Bismarck, ND 58505

Dear Senator Meyer:

Thank you for your opinion request as to the constitutionality of Senate Bill No. 2319.

Senate Bill No. 2319 establishes a method of betting on horse races based upon a certificate system. The certificate system allows a licensee to receive money from any person present at a race who desires to bet on any horse entered in that race. A person betting on a horse to win acquires an interest in the total money bet on all horses in the race in proportion to the amount of money bet by that person. For each bet the licensee shall issue a certificate to the better on which is at least shown the number of the race, the amount bet, and the number or name of the horse selected by the better. Depending upon the average daily amount bet on the total horse races, the bill requires the licensee to deduct a specified amount of money to pay expenses and to make a deposit to the state's general fund.

Article XI, Section 25 of the North Dakota Constitution prohibits the Legislative Assembly from authorizing any game of chance, lottery, or gift enterprises. However, this constitutional provision does allow the Legislative Assembly to authorize nonprofit veterans, charitable, educational, religious, or fraternal organizations, civic and service clubs, or such other public-spirited organizations to conduct games of chance. The entire net proceeds of such games of chance must be devoted to educational, charitable, patriotic, fraternal, religious, or other public-spirited uses. The Legislature has specified and detailed those eligible uses of the net proceeds from games of chance at N.D.C.C. § 53-06.1-01(6).

In reviewing the constitutionality of Senate Bill No. 2319, two issues are presented. First, is parimutuel horse racing a game of chance? Second, does the bill meet the criteria set forth in Art. XI, §25 of the North Dakota Constitution?

Jurisdictions are split on whether parimutuel horse racing is a game of chance. The majority view is that parimutual betting constitutes a game of chance. Annot., 52 A.L.R. 74 (1928); Pompano Horse Club v. State, ex rel., Bryan, 111 So. 801 (Fla. 1927).

Horse racing with the pari-mutuel system of betting..... is a form of gambling. Selectmen of Topsfield v. State Racing Commission, 86 N.E.2d 65, 70 (Mass. 1949).

The fact that the element of chance may enter into the game of chance in terms of who gets a prize or how much as opposed to the events leading up the awarding of the prize does not change the conclusion, under the majority view, that a game of chance is present.

The element of chance which is necessary in order to have gambling can be supplied by having the happening of some future event determine who gets a prize or how much he gets, at least where such event is not certain to happen and even though the happening of such event is dependent predominantly upon skill. State v. Wac, 428 N.E.2d 428, 433 (Ohio 1981).

The conclusion of the majority of states that parimutuel betting constitutes a game of chance has also been based upon the fact that the element of chance is predominant over the element of skill.

A "game of chance" is a contest wherein chance predominates over skill.

Bayer v. Johnson, 349 N.W.2d 447, 449 (S.D. 1984). See also Baedaro v. Caldwell, 56 N.W.2d 706 (Neb. 1953); Bradford v. Hurt, 84 F.2d 722 (5th Cir. 1936); U.S. v. Thompson, 409 F.Supp. 1044 (D. Mont. 1976).

However, other states have held that horse racing is not a "game" but a sport or game of skill and, therefore, is not subject to restrictions that may affect "games of chance." The Utah Supreme Court has declared that a bill authorizing parimutuel horse racing and setting up a racing commission was constitutional and allowable under a constitutional section identical to N.D. Const. Art. XI, §25 (identical prior to the 1977 and 1981 modifications allowing charitable gambling.) That court held that parimutuel element performs no function in determining the result of the game or contest and therefore need not be considered in making a determination of constitutionality.

The Utah Supreme Court stated that the authorities are split on whether horse racing is a game of skill or chance. The court reasoned that since any game of skill contains an element of chance, the determination of whether a game of chance was present should be made on, the predominant factor involved in the game. The court then concluded that horse racing was predominantly a game of skill and therefore allowable under the constitution. Utah State Fair Association v. Green, 249 P. 1016 (Utah 1926); See also Gandolfo v. Louisiana State Racina Commission, 78 So.2d 504 (La. 1954).; Rohan v. Detroit Racing Ass'n, 22 N.W. 20 433 (Mich. 1946).

In reaching an opposite conclusion, however, the Texas Court of Criminal Appeals has held that regardless of whether horse racing is a game or a sport, or if a game, whether it is one of skill or of chance, is immaterial. When there is parimutuel betting, according to

the Texas Court, the process becomes a game of chance. Coulter v. State, 53 S.W.2d 477, 480 (Tex. Ct. of App. 1932).

Because of this split of authority, it would be impossible to determine with any certainty how the North Dakota Supreme Court would resolve this issue. However, the majority view supports the conclusion that parimutuel horse racing is a game of chance.

Assuming that parimutuel horse racing is considered a game of chance, the next issue is whether Senate Bill No. 2319 complies with the requirements of Art. XI, §25. The constitution prohibits games of chance unless the Legislature authorizes certain groups including civic and service clubs and other such public spirited organizations to conduct the games. Senate Bill No. 2319, on page 5, section 6, authorizes civic and service clubs and other public spirited organizations to be licensed to conduct horse racing. Thus, the constitutional requirement as to eligible organizations conducting the games of chance has been satisfied.

However, the constitution also requires that the entire net proceeds of gaming to be devoted to educational or other public spirited uses. I can find nothing in Senate Bill No. 2319 that discusses any devotion of funds. The bill sets out the payment formula which provides for the distribution of the gross wagers. The payout formula provides for the organization expenses, the percentage of money that is to go to the state general fund, and the percentage which should be returned to the betters. There does not appear to be any requirement that "net proceeds" be devoted to eligible purposes.

Therefore, it is my opinion that Senate Bill No. 2319, as written, does not comply with the North Dakota Constitution, Art. XI, §25, as the bill fails to require the devotion of net proceeds to educational, charitable, patriotic, fraternal, religious or other public-spirited uses.

Sincerely,

Nicholas J. Spaeth